Court of Appeals, State of Michigan

ORDER

Jakob Martin v Farm Bureau Insurance

Docket No. 254595

LC No. 02-041391 NF

Helene N. White
Presiding Judge

Kathleen Jansen

Kurtis T. Wilder
Judges

The Court orders that Appellee/Cross-Appellant's motion to notify the Court of counsel's mistake is GRANTED, and the Court orders that the opinion be modified to show the third and fourth sentences of the second full paragraph on page three of the opinion, as follows:

> "...Although plaintiff claimed benefits for the extra hours during these two weeks of twenty-four hour attendant care, defendant did not pay them. Thus, this temporary change in the prescription, increasing, rather than decreasing the amount of hours, for which defendant did not pay, had no real effect. ..."

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 2 9 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

JAKOB MARTIN, by his Next Friends LORRI MARTIN and SCOTT MARTIN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED January 17, 2006
v	No. 254595 Oakland Circuit Court
FARM BUREAU INSURANCE, Defendant-Appellant/Cross-Appellee.	LC No. 2002-041391-NF

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from a lower court judgment in favor of plaintiff enforcing a November 2002 settlement agreement between the parties. Plaintiff cross-appeals the trial court's denial of various motions for recovery of attorney fees. We affirm.

This action has its genesis in neurological injuries suffered by then 2 ¾ year-old plaintiff as a result of a motor vehicle accident on August 10, 2001. Plaintiff filed his complaint against defendant on June 30, 2002, seeking payment of attendant care and case management expenses allegedly incurred as a result of his injuries. In November 2002, the parties reached a settlement whereby defendant agreed to reimburse plaintiff's parents for attendant care services for plaintiff at the rate of $18 per hour for a number of hours consistent with those currently prescribed by plaintiff's treating physician, which at the time of the settlement was eighteen hours per day. The parties' agreement also provided that defendant could "revisit its obligations" if plaintiff's treating physician changed his prescription for attendant care benefits, or if defendant obtained reasonable proof contradicting that prescription.[1]

[1] The agreement was embodied in a letter from plaintiff's counsel to defendant's counsel. Defendant does not dispute that the letter constitutes the settlement agreement. The letter provides in part:

> At this time, we have reached an agreement where your client [defendant] will be reimbursing the Martin's [sic] for attendant care services [for plaintiff] at

(continued…)

In April 2002, before plaintiff filed his complaint, and well before any settlement was reached, plaintiff's treating physician recommended that plaintiff attend the local public school's program for preprimary impaired children ("PPI program"). Plaintiff was evaluated for placement in this program by the school district and began attending the PPI program in April 2002. Defendant was provided with a copy of the school's evaluation and was repeatedly notified of plaintiff's attendance at the PPI program in case management reports submitted to defendant in or after May 2002.

In January 2003, plaintiff's treating physician temporarily increased plaintiff's attendant care prescription from eighteen hours per day to twenty-four hours per day for a two-week period so that plaintiff's adjustment to new medication could be monitored. The physician returned the attendant care prescription to eighteen hours per day thereafter. Defendant was notified of the temporary change in prescription and that the prescribed amount of attendant care was returned to eighteen hours per day at the end of that period.

Defendant argues that the circuit court erred in entering judgment in plaintiff's favor enforcing the settlement agreement because its obligations to pay benefits under that agreement terminated by virtue of the January 2003 prescription change[2] and/or as a result of plaintiff's attendance at the PPI program without either of his parents, which defendant asserts contradicts his physician's prescription for attendant care for eighteen hours per day. We disagree.

This Court reviews a trial court's ruling on a motion for summary disposition de novo, reviewing the record in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "An agreement to settle a lawsuit is a contract that is subject to the legal principles generally applied to contracts." *Reed v Citizens Ins Co*, 198 Mich App 443, 447; 499 NW2d 22 (1993), overruled on other grds, *Griffith ex rel Griffith v State*

(…continued)

> the rate of $18.00 per hour. The amount of hours per day will be consistent with those currently prescribed by Dr. Neil Alpiner, [plaintiff's] treating physician. Further, your client has indicated that it will be reimbursing the case manager for services that have been provided, and I assume they will continue to do so in the future, as long as same is prescribed by Dr. Alpiner.
>
> In light of these circumstances, I am offering to voluntarily dismiss my clients' lawsuit, without prejudice, and maintain the status quo in this matter. My understanding is that your client will continue to pay attendant care benefits as well as reimburse my clients for other reasonable and necessary services, product and accommodations for my client's care, recovery and rehabilitation, in conformance with Michigan no-fault law. If Dr. Alpiner changes the prescription, your client can revisit its obligations under the Michigan no-fault law. Further, if your client obtains reasonable proof which would contradict the prescriptions of Dr. Alpiner, it can certainly revisit its obligations.

[2] We note that although defendant claims that this change in prescription triggered the termination of the settlement, defendant stopped paying under the settlement in December, 2002, before this change was made.

Farm Mut Auto Ins Co, 472 Mich 521; 697 NW2d 895 (2005). When "ascertaining the meaning of a contract, [courts] give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

Defendant reasons that by allowing it to "revisit its obligations," the agreement did not merely allow it to revisit the number of hours for which it would pay attendant care but, rather, once there was a prescription change or reasonable proof contradicting the prescription, defendant's obligation to pay benefits at the hourly rate established by the parties' agreement was discharged, and defendant became entitled to have a new rate of compensation established through negotiation or litigation. The circuit court disagreed, observing that nothing in the agreement indicated that defendant's obligations terminated upon the occurrence of either of these events. The circuit court also noted that there was nothing in the correspondence between the parties indicating that defendant had a unilateral and arbitrary right to reduce the rate of compensation set by the agreement.

We agree with the circuit court that the plain and ordinary meaning of "revisit" is to visit again - to readdress, reconsider or renegotiate; "revisit" does not mean "terminate," "end" or "obviate." Thus, the temporary change in plaintiff's prescription for attendant care for a two-week period following a change in plaintiff's medication allowed defendant to reconsider, renegotiate or readdress its obligation; it did not terminate the settlement agreement. Further, plaintiff did not seek benefits for the extra six hours per day for the two-week period during which twenty-four hour was prescribed. Thus, this temporary change in the prescription, increasing, rather than decreasing the amount of hours, for which plaintiff sought no additional benefits, had no real effect. While technically a change in the prescription, it was a change without consequence. We observe that defendant took the position below that the agreement provided that defendant would pay "attendant care based upon the documentation submitted by Plaintiff's physician, Dr. Neal Alpiner, until such time as there was a *material change* in the Plaintiff's need for attendant care." [Emphasis added.] We also agree with the circuit court that there is no language in the settlement agreement allowing defendant to unilaterally reduce the agreed-upon rate of compensation upon such a change. If the parties intended that a change in prescription would terminate the agreement or that it would allow defendant to change the rate of compensation for attendant care benefits, they could have so stated; they did not do so.

Next, we conclude that plaintiff's attendance at the PPI program does not constitute reasonable proof contradicting the prescription for eighteen hours of attendant care per day. That plaintiff is attending a program for children with developmental difficulties at the public school for three hours each weekday during the school year does not contradict his physician's determination that plaintiff needs adult guidance and supervision during his waking hours; rather, it merely indicates that for three hours each weekday during the school year, his attendant care is being provided by school personnel and not by his parents. Further, defendant's own medical evaluator agreed with plaintiff's physician's prescription. That plaintiff's parents are not providing such care because it is being provided by school personnel in no way contradicts the prescription that plaintiff be provided such care – by somebody - for eighteen hours per day. Thus, this provision of the agreement was not triggered. Plaintiff has not cross-appealed the court's determination that his parents are not entitled to be compensated for hours of attendant care that they themselves are not providing, although they are "on call."

Defendant has admitted that it entered into a valid settlement agreement with plaintiff in which it agreed to compensate plaintiff for attendant care at the rate of $18.00 per hour for the number of hours prescribed by plaintiff's treating physician, and plaintiff agreed to dismiss his lawsuit and waive any claims to interest and attorney fees in return. There is no language in the agreement that would permit defendant to unilaterally modify or abandon this settlement agreement, and, as explained above, the conditions for revisiting defendant's obligation did not occur. Therefore, the circuit court properly granted plaintiff's motion to enforce that agreement.

On cross-appeal, plaintiff argues that the circuit court erred in denying his various motions for attorney fees under MCL 500.3148, MCR 2.114, MCR 2.625(A)(2) and MCL 600.2591, on the basis that defendant had not unreasonably delayed payment under the agreement. We find no abuse of discretion in the circuit court's determination that there were legitimate questions as to the amount of hours for which payment was to be made. Indeed, the circuit court ruled in defendant's favor on the latter point, determining that plaintiff's parents were not entitled to payment for the period of time that plaintiff was in attendance at the PPI program without their assistance.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder